(1) Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

W. HAROLD SELLERS and ROBERT DUPRE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether venue for a 18 U.S.C. § 1957 money-laundering offense is properly triable in the Eastern District of Louisiana — even though Petitioners did not come into possession of any criminally derived proceeds in that district – as would be required by under *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998), and decisions of the Second, Tenth, and Eleventh Circuits.

Whether the retroactive application of *United States v. Wells*, 519 U.S. 482, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997) — and its finding that materiality is not an element of 18 U.S.C. § 1014 — violated the *ex post facto* clause of the United States Constitution.

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Petitioners, W. Harold Sellers and Robert Dupre, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") in this case.

OPINIONS BELOW

The June 30, 2000, opinion of the Fifth Circuit is unreported and is reproduced at Appendix ("App.") A hereto at 1a-3a. The July 7, 1999, underlying order of the district court denying Petitioners' motion for Certificate of Appealability on two of the issues forming the basis of this Petition is unreported and reproduced at Appendix B hereto at 4a-19a. The September 24, 1999, underlying order of the district court that denied Petitioners' motion for reconsideration of the July 7, 1999, Order is unreported and reproduced at Appendix C at 20a-23a. The order of the Fifth Circuit denying Petitioners' motion for rehearing is unreported and reproduced at Appendix D hereto at 24a-25a.

GROUNDS FOR JURISDICTION

The judgment of the Fifth Circuit was issued on June 30, 2000. Petitioners filed a Motion for Rehearing on July 13, 2000, which was denied on August 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the United States Constitution, provides in relevant part that "No Bill of Attainder or ex post facto Law shall be passed."

The Fifth Amendment of the United States Constitution, which provides in relevant part that "no person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment of the United States Constitution, which provides in relevant party that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law. . . ."

18 U.S.C. §§ 1014 and 1957, which are reprinted in Appendix E.

STATEMENT OF THE CASE

The Petitioners were indicted on August 13, 1995. The indictment alleged sixteen counts of criminal conduct, including two counts of bank fraud pursuant to 18 U.S.C. § 1344, three counts of false statement pursuant to 18 U.S.C. § 1014, nine counts of money-laundering pursuant to 18 U.S.C. § 1957, and conspiracy to commit bank fraud pursuant to 18 U.S.C. § 371.

A. The Issue of Proper Venue for the Money-laundering Counts.

The money-laundering counts of the indictment specifically alleged ". . . wire transfers in the following amounts from a domestic bank in Houston Texas to the following foreign and domestic accounts, such property having been derived from a specified unlawful activity, that is bank fraud as charged in Count 2."

The instructions from the district court to the petit jury specifically required the jury to find that the transactions involved in the money-laundering to have come from the bank fraud proceeds as charged in Count 2.

The jury found petitioners guilty of the money-laundering counts 7-15.

B. The Issue of Retroactive Application of the Wells Decision.

At the time of petitioners' three-week jury trial beginning August 1, 1994, and at the time of the bank fraud, false statement, and money-laundering offenses in December of 1988, the law in the Fifth Circuit held materiality to be an element of §§ 1014 and 1344. The government was required to prove materiality. The Court instructed the jury that materiality was for the Court to decide.

The United States Supreme Court decided the case of *Wells v. United States* in 1997, after the indictment and trial of petitioners. This decision removed materiality as an element from § 1014. The Fifth Circuit applied the holding of *Wells* as to materiality in their decision to affirm petitioners' conviction on direct appeal, 117 F.3d 810 (1997), *cert. denied*, 522 U.S. 1078, 118 S. Ct. 857.

Petitioners filed a Motion to Vacate and set aside their convictions under 28 U.S.C. § 2255 and urged both of Issues A and B herein. The district court denied their motion, and refused to grant a certificate of appealability on these issues. The district court held in its Order of July 8, 1999, that money-laundering was a continuing offense and that venue was proper where the underlying substantive offense occurred. [App. B at 8a]. The district court also held that in the light of *Wells* the failure to allow the jury to decide the issue of materiality was not *Gaudin* error, and was not prejudicial. [App. B at 14a].

The Petitioners separately sought a certificate of appealability in the Fifth Circuit on several issues, including the two forming the basis for this Petition. The Fifth Circuit denied this Motion for Certificate of Appealability on June 30, 2000, and then denied Petitioners' Motion for Rehearing on August 8, 2000. [App. A; App. D].

Petitioners seek the issuance of a Writ of Certiorari relating to the improper venue of the money-laundering convictions, and the retroactive application of *United States v. Wells*.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO VENUE SQUARELY CONFLICTS WITH THE DECISIONS OF THE FIRST, SECOND, FOURTH, SEVENTH, TENTH, AND ELEVENTH CIRCUITS.

The Petition should be granted because the Fifth Circuit decision is in conflict with the decisions of several other Circuits. The First, Second, Fourth, Seventh, Tenth, and Eleventh Circuits hold that money-laundering is an after-the-fact offense and is not a continuing offense. The Tenth Circuit interpreted the nature of a § 1957 offense as suggesting that Congress viewed such a violation as occurring only *after* the individual gained possession or disposal of the proceeds generated by the criminal activity; as did the Eleventh Circuit in agreeing that the underlying criminal activity must be complete before money-laundering can occur; the First and Fourth Circuits are in accord. In contrast, the Fifth Circuit affirmed the district court's holding that money-laundering was a continuing offense.

The Petitions should also be granted because the decision of the Court of Appeals is in conflict with this Court's decisions in *United States v. Cabrales*, 524 U.S. 1 (1998) and *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999). These cases hold that the existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct — defendant's money-laundering activity — occurred after the fact. Even though these cases of this Court were urged to the Fifth Circuit, that court affirmed the district court's holding declaring money-laundering to be a continuing offense.

The question presented by this issue is of constitutional dimension. Article III of the Constitution requires that "[t]he Trial of all Crimes . . . shall be held in the state where the said crimes shall have been committed." Its command is reinforced by the Sixth Amendment's requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." It is a question worthy of this Court's attention to finally put to rest the erroneous contention that venue for money-laundering may be proper anywhere the underlying offense continued to occur.

Petitioners would show that they have met the standard for issuance of a certificate of appealability. They have demonstrated that the questions raised on these two issues "are debatable among jurists of reason; that a court *could* resolve the issue [in a different manner] or that the questions are adequate to deserve encouragement to proceed further." *Ransom v. Johnson*, 126 F.3d 716, 720 (5th Cir. 1997), *cert. denied*, 522 U.S. 944, 118 S. Ct. 361 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). In each issue Petitioners have made a substantial showing of the denial of a federal right. *Barefoot* at 893; *Lozada v. Deeds*, 498 U.S. 430, 432 (1991). A certificate of appealability should have issued for both the venue and *ex post facto* issues.

Petitioners were tried in Louisiana where Oak Tree Savings Bank (OTSB) was headquartered. The loan transaction which formed the basis for all the substantive counts occurred exclusively in California. None of the funds came into Petitioners' hands until the funds arrived in Texas. The indictment charged the funds were transferred "from a domestic bank in Houston, Texas." The district court posited that the money-laundering counts were part of a continuing criminal offense, and were properly before the court. [App. B at 8a].

Other circuits squarely disagree with the Fifth Circuit's analysis of this important issue of federal and constitutional law:

> But the statute does not make money laundering a continuing offense. The statutory language and legislative history indicate that each transaction or transfer of money constitutes a separate offense. *See* Senate Report No. 433, 99th Cong. 2nd Sess. 12-13 (1986); *U.S. v. Conley*, 826 F. Supp. 1536, 1543-44 (W.D. Pa. 1993) (concluding that unit of prosecution is "each individual financial transaction.").

United States v. Kramer, 73 F.3d 1067, 1072 (11th Cir. 1996).

The Fifth Circuit has already determined the critical portion of this issue in its opinion in this case on its original appeal. *United States v. Dupre and Sellers*, 117 F.3d 810, 821- 22 (5th Cir. 1997), wherein it wrote:

> The bank fraud charged in Count 2 was complete when Lomas and OTSB, through Chicago Land Title Company, transferred the funds in question to Sellers' account in Houston, Texas. The crime was complete and *the funds became "criminally derived property" when they come under Sellers' control*. Therefore, counts 7-15, which stemmed from the subsequent wire transfers of funds to appellants' accounts in Cayman Island and throughout the United States, properly charged money laundering for purposes of §1957.

Id. (internal citations omitted) (emphasis added).

In its Order, the district court sought to harmonize this case with *Cabrales* by positing that the money-laundering counts were part of a continuing criminal offense. The Court concluded that where the launderer acquires the funds in one district and transferred them to another, venue can be proper in either district. Accepting the Court's rationale, the issue would appear to be whether Petitioners transferred funds from the Eastern District of Louisiana to another jurisdiction within the meaning of the money-laundering statute.

United States v. Piervinanzi, 23 F.3d 670, 677 (2nd Cir. 1994), *cert. denied*, 513 U.S. 900, 115 S. Ct. 259, interpreted the salient portions of 18 U.S.C. § 1957(a). In *Piervinanzi*, the defendant contended his actions did not come within the provisions of § 1957. The Second Circuit noted that the starting point for interpreting a statute is the plain meaning of the statute's language. *Id.* Unless otherwise defined, statutory words will be interpreted as taking their ordinary and common meaning. *Id.* At issue in *Piervinanzi* and in this case is whether the alleged money-laundering offense falls within the statutory language, or whether Petitioners "obtained" the "criminally derived property" in the Eastern District of Louisiana within the meaning of § 1957(a)(2).

As noted in *Piervinanzi*, "the ordinary meaning of the word 'obtained' entails possession of a thing." *Id.* at 677. Similarly, the word "property" implies ownership, or the "exclusive right to possess, enjoy, and dispose of a thing." *Id.* The use of this language demonstrates that the proceeds of a crime must actually be in the defendant's possession before he can attempt to launder them. *Id.*; *see also United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992).

Both the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity. *United States v. Lovett*, 964 F.2d 1029, 1042 (10th Cir. 1992) (stating "Congress intended [§ 1957] to separately punish a defendant for monetary transactions that follow in time the underlying specified unlawful activity that generated the criminally derived property in the first place.")

Clearly the money or "property" (as defined herein) was not "obtained" (as defined herein) and was not "possessed, enjoyed, or disposed of" by the Petitioners until they received it in Houston Texas.

United States v. Mullens, 65 F.3d 1560, 1564-65 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112, 116 S. Ct. 1337, held that "possession" is defined as deposited in the defendant's account, "[o]nce deposited, the funds met the definition 'of laundered funds' under 18 U.S.C. 1956(a)." The first deposit by Petitioners of any proceeds was in Houston, Texas, as clearly stated in the indictment. Simply put, Petitioners did not have "possession" of the money until it was deposited into the Houston bank accounts (as previously determined by the Fifth Circuit in *United States v. Dupre and Sellers*, *supra*).

In *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992), the Tenth Circuit, in overturning the defendant's conviction for money-laundering, similarly interpreted the nature of a 18 U.S.C. § 1957 offense as "suggest[ing] Congress viewed a violation of § 1957 as occurring only *after* the individual . . . gained possession or disposal of the proceeds generated by the criminal activity." *Id.* at 568.

> In each of these cases we concluded that Congress intended to impose separate punishments for the money-laundering transactions and for the underlying criminal activity.
>
> * * *
>
> Congress aimed the crime of money laundering at conduct *that follows in time* the underlying crime. . . .

Id. at 569 (emphasis added); *See also United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223, 112 S. Ct. 3037 (1992); *United States v. Lovett*, 964 F.2d 1029 (10th Cir. 1992). Similarly the Eleventh Circuit in *United States v. Christo*, 129 F.3d 578, 580-81 (11th Cir. 1997), agreed that "the underlying criminal activity must be *complete* before money laundering can occur." (emphasis in original).

The main issue in a money-laundering charge, therefore, is determining *when* the predicate crime [bank fraud] becomes a "completed offense," *after which* money-laundering can occur. *United States v. Kennedy*, 64 F.3d 1465, 1477-78 (10th Cir. 1995). A bank fraud offense is not complete until there is an "execution" of the scheme to defraud. The execution is completed by the movement of money from the financial institution. *United States v. Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States v. Lilly*, 983 F.2d 300, 304-05 (1st Cir. 1992).

Oak Tree Savings Bank lost nothing through the bank fraud until it paid the money to Chicago Title in California. Chicago Title paid the money to Lomas Financial in Dallas,

Texas, and then Lomas paid the money to Sellers and Dupre in Houston, Texas. Only then did the Petitioners gain control of the money to wire transfer it to other accounts — *the steps necessary to constitute money-laundering.*

United States v. Mankarious, 151 F.3d 694, 703-05 (7th Cir. 1998), *cert. denied*, 525 U.S. 1056, 119 S. Ct. 621, confirmed the case holdings that stand for the rule that the predicate offenses must produce proceeds *before* anyone can launder these criminally derived proceeds. Cases use the language of time to describe the relationship of money-laundering and the predicate offense. These cases state that the predicate offense must be "completed" or "earlier" or "antecedent" to the money-laundering. *Id.* at 703; *See, e.g., United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998) (stating the money-laundering statutes "interdict only the financial transactions . . . not the anterior criminal conduct that yielded the funds actually laundered." *Id.* at 1776).

United States v. Brennan, 183 F.3d 139, 144 (2nd Cir. 1999) emphasized the right of the accused to be prosecuted where the crime was committed:

> As the Supreme Court has recently reiterated, "[T]he *locus delicto* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 119 S. Ct. 1239, 1242, 143 L.Ed.2d 388 (1999), quoting *United States v. Cabrales*, 524 U.S. 1, 6-7, 118 S. Ct. 1772, 141 L.Ed.2d 1 (1998). In doing so we look at the "key words which define the criminal offense in the statute. . . ." Prosecution under the mail fraud statutes is permissible only

> in those districts in which a prescribed act occurs, *i. e.*, in which the defendant "places," "deposits," "causes to be deposited," "takes," or "receives" mail.

Id. at 147.

The money-laundering statute, § 1957, clearly permits prosecution only where the acts occurred — where Petitioners received the money and then laundered it by wire transfer — Houston, Texas.

II.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO VENUE CONFLICTS WITH A PRIOR DECISION OF THIS COURT, AND OTHERWISE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW.

The decision of the Fifth Circuit conflicts with a controlling opinion of this Court. In *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998), a unanimous court determined that the proper venue for a section 1957 money-laundering count was appropriate in the venue where the money-laundering occurred; *not where the underlying crime occurred. Id.* at 1775. Money-laundering is essentially an "after the fact" crime.

In *Cabrales*, the laundered money derived from the unlawful distribution of cocaine in Missouri, while the laundering all occurred in Florida. *Id.* at 1774. The Court succinctly stated, "[t]hat the money came from Missouri is of no moment," and affirmed the Eighth Circuit's decision

to uphold the trial court's dismissal of the indictment. *Id.* at 1775. Prior to *Cabrales*, the Fourth, Seventh and Ninth Circuits had held that venue was proper in the district where the funds were unlawfully generated. *Id.*

The Supreme Court decision in *United States v. Rodriguez-Moreno*, 526 U.S. 275, 119 S. Ct. 1239, (1999) is also instructive. This cased involved the question of venue in a firearm/violent crime prosecution. In *Rodriquez-Moreno*, The Supreme Court dealt with 18 U.S.C. § 924(c)(1), which provides in relevant part:

> Whoever, *during and in relation* to any crime of violence . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishments provided for such crime of violence . . . be sentenced to imprisonment for five years.

The Petitioner in *Rodriquez-Moreno* was tried and convicted in New Jersey under this statute. Petitioner argued that because he used the firearm solely in Maryland, venue for this crime was improper in New Jersey. The Third Circuit accepted this argument, and reversed. The Supreme Court granted certiorari to resolve an apparent conflict between the Third Circuit and the Fifth Circuit in *United States v. Pomranz*, 43 F.3d 156 (5th Cir. 1995), *cert. denied*, 526 U.S. 275, 116 S. Ct. 513.

In reversing the Third Circuit, the Supreme Court compared its 1998 decision in *United States v. Cabrales* to *Rodriguez-Moreno*. The Supreme Court was careful to distinguish the result in *Rodriguez-Moreno*:

> By way of comparison, last term in *United States v. Cabrales*, 524 U.S. 1, 118 S. Ct. 1772 (1998), we considered whether venue for money laundering, in violation of 18 U.S.C. §§ 1956(a)(I)(B)(ii) and 1957, was proper in Missouri, where the laundered proceeds were unlawfully generated, or rather, only in Florida, where the prohibited laundered transactions occurred. As we interpreted the laundering statutes at issue, they did not proscribe "the anterior criminal conduct that yielded the funds allegedly laundered." *Cabrales*, 524 U.S. at 7, 118 S. Ct. 1772. The existence of criminally generated proceeds was a circumstance element of the offense but the proscribed conduct — defendant's money laundering activity — occurred " 'after the fact' of an offense begun and completed by others." Ibid. *Here, by contrast, given the "during and in relation to"* language, the underlying crime of violence is a critical part of the § 924(c)(I) violation.

Rodriguez-Moreno, 526 U.S. at 280 n.4, 119 S. Ct. 1239. (emphasis added). This further illustrates the separate nature of the money-laundering offense, which, in this case, occurred exclusively in Houston, Texas.

It is impossible to argue that the Petitioners ever received possession any money in Louisiana, where they were tried. Proper venue could only be had in Houston, Texas. Petitioner respectfully requests the issuance of a Writ of Certiorari to resolve this important issue of federal law.

III.

THE DECISION OF THE FIFTH CIRCUIT AS IT RELATES TO THE RETROACTIVE APPLICATION OF THE *WELLS* DECISION CONFLICTS WITH THIS COURT'S PRIOR PRECEDENT DEALING WITH THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* APPLICATION OF INTERVENING JUDICIAL DECISIONS TO PENDING CASES.

Even before the enactment of Federal Constitution's amendments known as the Bill of Rights, some specific limitations on governmental power were incorporated into the Constitution. One of those limitations, imposed by the Constitution on the Federal government (in Art. I, § 9, cl. 3) and on the states (in Art. I, § 10, cl. 1) consisted of prohibiting the passage of what had been known as "*ex post facto*" laws — literally, laws passed "after the fact." *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715 (1990).

Starting with the opinion of Justice Chase in the seminal case of *Calder v. Ball*, 3 U.S. 386 (1798), the Supreme Court has recognized four basic types of retrospective changes in penal law which are prohibited by the *ex post facto* clauses — enactments which ". . . (4) alter the legal rules of evidence so as to allow conviction upon less or different proof than the law required at the time an offense was committed." For a detailed citation of such cases pertaining to (4) see Annotation *Ex Post Facto* Clauses, 131 L. Ed. 2d 1043 at § 4(e), 1069-71.[1]

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1. A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say,

(Cont'd)

In *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446 (1987) the court held that in order for a statute to fall within the Federal Constitution's prohibitions against *ex post facto* laws, the statute must disadvantage the offender affected by it, must alter substantial personal rights, and must be more onerous than the prior law. Similarly, the Supreme Court held in *California Dept. of Corrections v. Morales*, 514 U.S. 499, 115 S. Ct. 1597 (1995) the focus of an inquiry under the Constitution's *ex post facto* clause is not on whether a legislative change produces some ambiguous sort of disadvantage, but on whether any such change alters the definition of criminal conduct.

Legislative enactments retrospectively eliminating a defense to a criminal charge are invalid under the *ex post facto* clause of the Federal Constitution. The criminal quality attributable to an act, by the legal definition of the offense, should not be altered after the fact to the disadvantage of the accused. *Dobert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290 (1977). Further, a law which alters the legal rules of evidence so as to require less or different proof than the law required at the time of commission of an offense, in order to convict

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(Cont'd)

> retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. . . . In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption. . . . Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end.

Carmell v. Texas, 67 Crim. L. Reporter 166 (Aug. 30, 2000).

the offender, is an *ex post facto* law. A legislature, by simply labeling a law procedural, cannot immunize it from scrutiny under the *ex post facto* clause. *Collins v. Youngblood*; *Miller v. Florida*, *supra*.

Although the *ex post facto* clauses of the Federal Constitution have been held to apply to legislation, there is precedent that similar restrictions apply, as a matter of due process, to judicial changes in the law. *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697 (1964). In *Bouie*, the Court noted that (1) an unforeseeable judicial enlargement of a criminal statute, applied retrospectively, operated precisely like an *ex post fact* law; and (2) if a state legislature was barred from passing such a law, then it must follow that a state court was barred by the due process clause of the Constitution's Fourteenth Amendment from achieving the same result by judicial construction. Similarly, the court in *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990 (1977), in rejecting the retroactive application of a judicially created obscenity standard, noted that the principle on which the *ex post facto* clause is based — namely the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — was fundamental to the concept of constitutional liberty and, as such, was protected against judicial action by the due process clause of the Constitution's Fifth Amendment.

In Petitioners' case, the government conceded that materiality was an element of the § 1014 counts at the time of trial by including it as an element in the indictment. The district court included this element in its jury instructions although it told the jury it was for the court to decide.

Wells v. United States, 519 U.S. 482, 117 S. Ct. 921 (1997), was not decided until February, 1997, after the indictment and trial of Petitioners. Although *Wells* removed materiality as an element from § 1014, it is undisputed that materiality was an element of § 1014 when Petitioners were tried for the crime. After *Gaudin* and before *Wells*, in 1996, the Fifth Circuit decided (on the second rehearing) in *United States v. Jobe*, 101 F.3d 1046 (5th Cir. 1996), that §§ 1014 and 1344 would require the government to prove and *the jury to find materiality*. *Id.* at 1061 (stating "Count 1 conspiracy convictions required materiality findings insofar as they rested on substantive § 1014 false statement and § 1344 bank fraud offenses, which have up to now clearly incorporated a materiality element.")

Petitioners objected to the refusal of the district court to submit the issue of materiality to the jury and in lieu thereof Petitioners submitted proposed instructions for the court to allow the jury to determine the issue of the materiality element. *Jobe* underscores that *Wells* changed the elements of § 1014 to omit materiality *after* Appellants' trial had concluded. *Jobe*, 101 F.3d at 1061. Prior to *Wells*, every circuit court had included materiality as an element of § 1014. It was not within the Fifth Circuit's power to retroactively apply the holdings in *Wells* to Petitioners.

One ought not to be punished if one reasonably relies upon a judicial decision later held to have been erroneous. The better view is that it is a defense that the defendants acted in reasonable reliance upon a judicial decision later held to be invalid or erroneous. W. LA FAVE AND A. SCOTT, *Substantive Criminal Law*, § 5.1 at 591 (1986).

Petitioners made materiality the cornerstone of their defense, as was initially recognized by the district court. [App. B. at 16a]. In preparing their defense, they relied heavily on the fact that *every* Circuit Court of Appeals recognized materiality as an element of § 1014 at the time of their indictment and trial.

In *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990 (1977), the Supreme Court faced a similar problem of changing law. In *Marks*, the defendants were charged with violating a federal statute outlawing the transportation of obscene materials. *Id.* at 991. At the time the conduct occurred, controlling case law included a test that material was not pornographic unless it is "utterly without redeeming social value." *Id.* at 992 (citing *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S. Ct. 975 (1966)). Prior to trial, the Supreme Court altered this test in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), which adopted a test inquiring into "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* The defendants were tried on the more stringent *Miller* test, and convicted. The *Marks* court held that trying the defendants on the more stringent *Miller* test was unconstitutional, and reversed for a new trial. *Id.* at 995. Prior to addressing the substantive issue of whether the new *Miller* standard could be retroactively applied, the Supreme Court crystallized that *judicial action* falls within the *Ex Post Facto* Clause limitation. *Marks*, 430 U.S. at 191-92, 97 S. Ct. 992-93 (explaining that Fifth Amendment protections of due process prohibit retroactive application of judicial decisions affecting individual's right of fair warning of criminal conduct). As *Marks* explained, "[a]n unforeseeable *judicial* enlargement of criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I § 10 of the Constitution forbids." *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 1703).

In finding that the more stringent *Miller* test could *not* be retroactively applied, the Supreme Court summarized its reasons with:

> We therefore hold . . . that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller v. California*, to the extent those standards may impose criminal liability for conduct not punishable under *Memoirs*. Specifically, since the petitioners were indicted for conduct occurring prior to our decision in *Miller*, they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value."

Id. at 995.

Marks is indistinguishable. Petitioners were indicted at a time when 18 U.S.C. § 1014 included materiality. Materiality should have been submitted for the jury's consideration; the failure to do so was clear *Gaudin* error. The fact that *Wells* changed the elements of § 1014 after Appellants were tried and convicted should remain fundamentally irrelevant to the analysis, as *Marks* teaches that it cannot be retroactively applied. Doing otherwise would result in a continuing infringement of Petitioners' due process rights, and a violation of the Constitution's prohibition against *ex post facto* laws.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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